

Senate File 2364

S-5095

1 Amend the amendment, S-5089, to Senate File 2364 as follows:

2 1. By striking page 1, line 4, through page 10, line 3, and  
3 inserting:

4 <<DIVISION I

5 PUBLIC CONSTRUCTION BIDDING DEFINITIONS

6 Section 1. Section 26.2, subsection 3, paragraph b,  
7 subparagraph (5), Code 2020, is amended to read as follows:

8 (5) Construction or repair or maintenance work performed  
9 for a city utility under chapter 388 when such work is  
10 performed by its employees or when such work relates to  
11 existing utility infrastructure or to establishing connections  
12 to existing utility systems.

13 (6) Construction or repair or maintenance work performed  
14 for a rural water district under chapter 357A by its employees.

15 DIVISION II

16 ALTERNATIVE PROJECT DELIVERY CONTRACTS

17 Sec. 2. NEW SECTION. 26.17 **Alternative project delivery**  
18 **contracts.**

19 1. As used in this section, unless the context otherwise  
20 requires:

21 a. "*Alternative project delivery contract*" means either a  
22 design-build or construction manager-at-risk contract.

23 b. "*Bridging criteria professional*" means a person,  
24 corporation, partnership, or other legal entity that is  
25 employed by or contracted by a government entity to assist  
26 the government entity in the development of project design  
27 criteria, requests for proposals, and any additional services  
28 requested by the government entity to represent its interests  
29 in relation to a project and who meets either of the following  
30 requirements:

31 (1) Is duly licensed to practice architecture within the  
32 state and can demonstrate specific knowledge of the project  
33 type where alternative project delivery services are being  
34 sought.

35 (2) Is duly licensed as a professional engineer within the

1 state and can demonstrate specific knowledge of the project  
2 type where alternative project delivery services are being  
3 sought.

4     *c. "Construction manager-at-risk"* means a sole  
5 proprietorship, partnership, corporation, or other legal entity  
6 that acts as a consultant to the government entity in the  
7 development and design phases and then assumes the risk for  
8 the construction, rehabilitation, alteration, or repair of a  
9 project at the contracted fixed or guaranteed maximum price,  
10 similar to a general contractor during the construction phase.  
11 A project using a construction manager-at-risk does not include  
12 the construction, reconstruction, or improvement of a highway,  
13 bridge, or culvert.

14     *d. "Design-build"* means a project delivery method subject to  
15 a two or three-phase selection process for which the design and  
16 construction services are furnished under one contract.

17     *e. "Design-build contract"* means a contract between  
18 a government entity and a design-builder to furnish the  
19 architecture of record, engineering of record, and related  
20 services as required for a given public project, and to  
21 furnish the labor, materials, and other construction services  
22 for the same public project. A design-build contract may be  
23 conditioned upon subsequent refinements in scope and price, and  
24 may permit the government entity to make changes in the scope  
25 of the project without invalidating the design-build contract.

26     *f. "Design-build project"* means the design, construction,  
27 alteration, addition, remodeling, or improvement of any  
28 buildings, infrastructure, or facilities under contract with a  
29 government entity. *"Design-build project"* does not include a  
30 project for the construction, reconstruction, or improvement of  
31 a highway, bridge, or culvert.

32     *g. "Design-builder"* means any individual, partnership,  
33 joint venture, or corporation subject to a best-value or  
34 qualification-based selection that offers to provide or  
35 provides design services and general contracting services

1 through a design-build contract in which services within  
2 the scope of the practice of professional architecture or  
3 engineering are performed respectively by a licensed architect  
4 or licensed engineer and in which services within the scope of  
5 general contracting are performed by a general contractor or  
6 other legal entity that furnishes architecture or engineering  
7 services and construction services either directly or through  
8 subcontracts or joint ventures.

9     *h. "Design bridging criteria package"* means the  
10 performance-oriented program, scope, design, and performance  
11 specifications for the design-build project sufficient to  
12 permit a design-builder to prepare a response to a government  
13 entity's request for proposals for a design-build project.

14     *i. "Government entity"* means the same as *"governmental*  
15 *entity"* defined in section 26.2 including, for the purpose of  
16 this section, the state board of regents.

17     *j. "Proposal"* means an offer by a design-builder in response  
18 to a request for proposals to enter into a design-build  
19 contract.

20     *k. "Request for proposals"* means the document by which  
21 a government entity solicits proposals for a design-build  
22 contract.

23     1. *"Stipend"* means a payment to a design-builder who did not  
24 score the highest number of points at the conclusion of phase  
25 three of the best-value selection process to defray the cost of  
26 participating in phase two of the selection process, and for  
27 the use of any intellectual properties obtained.

28     2. Notwithstanding any other law to the contrary, a  
29 government entity shall be authorized to enter into an  
30 alternative project delivery contract.

31     3. Construction manager-at-risk contracts.

32     *a.* A government entity shall publicly disclose its intent to  
33 use the construction manager-at-risk method and its selection  
34 criteria at least one week prior to publishing the request  
35 for proposals and request for statements of qualifications.

1 The government entity shall publish its request for proposals  
2 and statements of qualifications. Before or concurrently  
3 with selecting a construction manager-at-risk, the government  
4 entity shall select or designate an engineer or architect  
5 who shall prepare the construction documents for the project  
6 and who shall comply with all state laws, as applicable. If  
7 the engineer or architect is not a full-time employee of the  
8 government entity, the government entity shall select the  
9 engineer or architect on a basis of demonstrated competence and  
10 qualifications. The government entity's engineer or architect  
11 for a project may not serve, alone or in combination with  
12 another, as the construction manager-at-risk. This paragraph  
13 does not prohibit a government entity's engineer or architect  
14 from providing customary construction-phase services under  
15 the engineer's or architect's original professional service  
16 agreement in accordance with applicable licensing laws.

17     *b.* The government entity may provide or contract for,  
18 independently of the construction manager-at-risk, inspection  
19 services, testing of construction materials, engineering, and  
20 verification of testing services necessary for acceptance of  
21 the project by the government entity.

22     *c.* The government entity shall select the construction  
23 manager-at-risk in a two-phase process.

24     (1) Phase one. The government entity shall prepare a  
25 request for statements of qualifications for the first phase.  
26 The request shall include general information on the project  
27 site, project scope, schedule, selection criteria, the time  
28 and place for receipt of statements of qualifications, and  
29 other information that may assist the government entity in its  
30 selection of a construction manager-at-risk. The selection  
31 criteria may include the construction manager-at-risk's  
32 experience, past performance, safety record, proposed personnel  
33 and methodology, and other appropriate factors that demonstrate  
34 the capability of the construction manager-at-risk. The  
35 government entity shall not request fees or prices in phase

1 one.

2 (2) Phase two. In phase two, the government entity  
3 shall issue a request for proposals. The government entity  
4 may request that no more than five nor fewer than two  
5 construction managers-at-risk, selected solely on the basis  
6 of qualifications, provide additional information, including  
7 the construction manager-at-risk's project proposal, proposed  
8 fee, its price for fulfilling the general conditions, and its  
9 distribution plan for sharing any cost savings after completion  
10 of said project. Qualifications shall account for a minimum  
11 of forty percent of the evaluation. Cost shall account for a  
12 maximum of sixty percent of the evaluation.

13 d. For each phase, the government entity shall receive,  
14 publicly open, and read aloud the names of the construction  
15 managers submitting proposals or statements of qualifications,  
16 respectively. Within forty-five days after the date of opening  
17 the proposals or statements of qualification submissions, the  
18 government entity or its representative shall evaluate and rank  
19 each proposal or statement of qualifications submission in  
20 relation to the criteria set forth in the applicable request.

21 e. The government entity or its representative shall  
22 select the construction manager-at-risk that submits the  
23 proposal that offers the best value for the government entity  
24 based on the published selection criteria and on its ranking  
25 evaluation. The government entity or its representative  
26 shall first attempt to negotiate a contract with the selected  
27 construction manager-at-risk. If the government entity or its  
28 representative is unable to negotiate a satisfactory contract  
29 with the selected construction manager-at-risk, the government  
30 entity or its representative shall, formally and in writing,  
31 end negotiations with that construction manager-at-risk and  
32 proceed to negotiate with the next construction manager-at-risk  
33 in the order of the selection ranking until a contract  
34 is reached or negotiations with all ranked construction  
35 managers-at-risk end.

1     *f.* The selected construction manager-at-risk shall publicly  
2 advertise and receive bids or proposals from trade contractors  
3 or subcontractors for the performance of all major elements of  
4 the work other than the minor work that may be included in the  
5 general conditions. A construction manager-at-risk submits  
6 its sealed bid or sealed proposal in the same manner as all  
7 other trade contractors or subcontractors. All sealed bids  
8 or proposals shall be submitted at the time and location as  
9 specified in the advertisement for bids or proposals and shall  
10 be publicly opened and the identity of each bidder and their  
11 bid amount shall be read aloud.

12     *g.* The construction manager-at-risk and the government  
13 entity or its representative shall review all trade contractor,  
14 subcontractor, or construction manager-at-risk bids or  
15 proposals in a manner that does not disclose the contents of  
16 the bid or proposal during the selection process to a person  
17 not employed by the construction manager-at-risk, engineer,  
18 architect, or government entity involved with the project. If  
19 the construction manager-at-risk submitted bids or proposals,  
20 the government entity shall determine if the construction  
21 manager-at-risk's bid or proposal offers the best value for the  
22 government entity. After all proposals have been evaluated and  
23 clarified, the award of all contracts shall be made public.

24     *h.* If the construction manager-at-risk reviews, evaluates,  
25 and recommends to the government entity a bid or proposal from  
26 a trade contractor or subcontractor but the government entity  
27 requires another bid or proposal to be accepted, the government  
28 entity shall compensate the construction manager-at-risk by  
29 a change in price, time, or guaranteed maximum cost for any  
30 additional cost and risk that the construction manager-at-risk  
31 may incur because of the government entity's requirement that  
32 another bid or proposal be accepted.

33     *i.* If a selected trade contractor materially defaults in the  
34 performance of its work or fails to execute a contract with a  
35 construction manager-at-risk after being selected in accordance

1 with this subsection, the construction manager-at-risk may  
2 itself, without advertising, fulfill the contract requirements  
3 or select a replacement trade contractor to fulfill the  
4 contract requirements.

5 4. In soliciting proposals for a design-build contract,  
6 a government entity shall determine the scope and level of  
7 detail required to permit design-builders to submit proposals  
8 in accordance with the request for proposals given the nature  
9 of the project.

10 5. *a.* A bridging criteria professional may be retained by  
11 the government entity as the government entity's representative  
12 to advise the government entity on design-build matters. The  
13 use of the bridging criteria professional shall be strictly  
14 to guide and administer the government's needs through the  
15 process. The bridging criteria professional shall have  
16 demonstrated sufficient previous experience in rules and  
17 procedures specific to the design-build process. The bridging  
18 criteria professional shall, along with the government  
19 entity, be authorized to make recommendations or influence  
20 the acceptance of any material, process, or procedure used  
21 during the design and construction processes in accordance  
22 with the criteria established for the project for the purpose  
23 of evaluating compliance of the work. The bridging criteria  
24 professional may be employed or contracted by the government  
25 entity to act on behalf of the government entity for the sole  
26 purpose of administrative procedures and may not be connected  
27 in any means to the design-build team. The duration of  
28 bridging criteria professional services, prior to the issuance  
29 of a design-build contract, may begin when establishing  
30 the government entity's program requirements through design  
31 development if the complexity of the project with the  
32 governmental entity merits this level of bridging information.

33 *b.* The design bridging criteria package developed by the  
34 bridging criteria professional, which may include preliminary  
35 designs for the project, may extend to the design development

1 level of detail, including design expectations, capacity,  
2 durability, standards, ingress and egress requirements,  
3 international building code considerations, performance  
4 requirements, the government entity's operational expectations,  
5 requirements for interior and exterior spaces, material and  
6 building system quality standards, and design and construction  
7 schedule timelines. Longevity of materials and system  
8 performance requirements shall be identified in the design  
9 bridging criteria package to identify materials and systems  
10 that have the potential to exceed the length of time the  
11 project is funded. The design bridging criteria package may  
12 include site development requirements, description of the  
13 site, surveys, soil and environmental information concerning  
14 the site, provisions for utilities, storm water retention  
15 and disposal, parking requirements, requirements related  
16 to applicable local laws, local permitting requirements,  
17 preliminary designs for the project or portions thereof, and  
18 other criteria for the intended use of the project.

19 6. A government entity shall publicly disclose its intent to  
20 solicit proposals for a design-build contract and its project  
21 design bridging criteria package in the same manner that it  
22 would post notice for the competitive bidding process in  
23 section 26.3.

24 7. In soliciting proposals for a design-build contract, a  
25 government entity shall establish in the request for proposals  
26 a time, place, and other specific instructions for the receipt  
27 of proposals. Proposals not submitted in strict accordance  
28 with the instructions may be subject to rejection. Minor  
29 irregularities may be waived by the government entity.

30 8. A request for proposals shall be prepared for each  
31 design-build contract and shall contain, at minimum, the  
32 following elements:

33 a. The procedures to be followed for submitting proposals,  
34 the criteria for evaluating proposals and their relative  
35 weight, and the procedure for making awards.



1     *b.* The proposed terms and conditions for the design-build  
2 contract, if available.

3     *c.* The design bridging criteria package.

4     *d.* A description of the drawings, specifications, or other  
5 information to be submitted with the proposal, with guidance  
6 as to the form and level of completeness of the drawings,  
7 specifications, or other information that will be acceptable.

8     *e.* A schedule for planned commencement and completion of the  
9 design-build contract, if available.

10    *f.* Budget limits for the design-build contract, if any.

11    *g.* Requirements including any available ratings for  
12 performance bonds, payment bonds, and insurance, if any.

13    *h.* If using a three-phase, best-value selection process, the  
14 amount of the stipend that will be available.

15    *i.* Any other information that the government entity in  
16 its discretion chooses to request including but not limited  
17 to surveys, soil reports, drawings of existing structures,  
18 environmental studies, photographs, references to public  
19 records, or affirmative action and minority business enterprise  
20 requirements consistent with state and federal law.

21    9. A government entity seeking to enter a design-build  
22 contract shall solicit design-build proposals either by  
23 using a three-phase, best-value process or a two-phase,  
24 qualifications-based process.

25    *a.* When solicitations require a three-phase, best-value  
26 selection process, the process shall be conducted as follows:

27       (1) Phase one. Request for statements of qualifications of  
28 design-builders.

29       (a) The government entity shall review submitted statements  
30 of the qualifications and assign points to each in accordance  
31 with this section and as set out in the instructions of the  
32 request for qualifications.

33       (b) All design-builders shall submit a statement of  
34 qualifications that shall include but not be limited to:

35           (i) Demonstrated ability to perform projects comparable in

1 design, scope, and complexity.

2 (ii) References of owners for whom design-build projects,  
3 construction projects, or design projects have been performed.

4 (iii) Qualifications of personnel who will manage the  
5 design and construction aspects of the project.

6 (iv) The names and qualifications of the primary design  
7 consultants and the primary trade contractors with whom the  
8 design-builder proposes to subcontract or joint venture. The  
9 design-builder may not replace an identified contractor,  
10 subcontractor, design consultant, or subconsultant without the  
11 written approval of the government entity.

12 (c) The government entity shall evaluate the qualifications  
13 of all the design-builders who submitted statements of  
14 qualifications in accordance with the instructions of the  
15 request for qualifications. Qualified design-builders  
16 selected by the government entity may proceed to phase two  
17 of the selection process. The evaluation shall narrow the  
18 number of qualified design-builders submitting statements of  
19 qualifications to not fewer than two nor more than five. Under  
20 no circumstances shall price or fees be a part of the request  
21 for statements of qualifications criteria. Design-builders may  
22 be interviewed in either phase one or phase two of the process.  
23 Points assigned in phase one of the evaluation process shall  
24 not carry forward to phase two or phase three of the process.  
25 All qualified design-builders shall be ranked on points given  
26 in phases two and three only.

27 (d) Once no fewer than two and no more than five qualified  
28 design-builders have been selected, the government entity shall  
29 issue its request for proposals and provide the design-builders  
30 a specified amount of time in which to concurrently assemble  
31 phase two and phase three proposals.

32 (2) Phase two. Solicitation of technical proposals,  
33 including conceptual design for the project.

34 (a) A design-builder shall submit its design for the project  
35 to the level of detail required for the proposal along with

1 such other information the government entity requests, which  
2 may include a schedule, qualifications, and experience.

3 (b) The ability of the design-builder to meet the schedule  
4 for completing a project as specified by the government entity  
5 may be considered as an element of evaluation in phase two.

6 (c) Under no circumstances shall the design proposal  
7 contain any reference to the cost of the proposal.

8 (d) The submitted designs shall be evaluated and assigned  
9 points in accordance with the requirements of the request for  
10 proposals. Phase two shall account for not less than forty  
11 percent and no more than sixty percent of the total point score  
12 as specified in the request for proposals.

13 (3) Phase three. Proposal of construction costs.

14 (a) The government entity shall invite the selected  
15 design-builders to participate in phase three. The  
16 design-builders shall provide a fixed cost of design and  
17 construction. The proposal shall be accompanied by bid  
18 security and any other items, such as statements of minority  
19 participation, as required by the request for proposals.

20 (b) Cost proposals shall be submitted in accordance with  
21 the instructions in the request for proposals. The government  
22 entity shall reject any proposal that is not submitted within  
23 the required time frame. Phase three shall account for not  
24 less than forty percent and no more than sixty percent of the  
25 total point score as specified in the request for proposals.

26 (c) Proposals for phase two and phase three shall be  
27 submitted concurrently at the time and place specified in the  
28 request for proposals, but in separate envelopes or other means  
29 of submission. The phase three cost proposals shall be opened  
30 and read aloud only after phase two design proposals have been  
31 evaluated and assigned points, ranked in order, and posted.  
32 Cost proposals shall be opened and read aloud at the time and  
33 place specified in the request for proposals. At the same time  
34 and place, the evaluation team shall make public its scoring  
35 of phase two. Cost proposals shall be evaluated in accordance

1 with the requirements of the request for proposals.

2 (d) If the government entity determines that it is not in  
3 the best interest of the government entity to proceed with the  
4 project pursuant to the proposal offered by the design-builder  
5 with the highest total number of points, the government entity  
6 shall reject all proposals. In this event, all design-builders  
7 with lower point totals in phases two and three shall receive  
8 a stipend and the responsive design-builder with the highest  
9 point total shall receive an amount equal to two times the  
10 stipend. If the government entity decides to award the  
11 project, the responsive design-builder with the highest point  
12 total shall be awarded the contract.

13 (e) As an inducement to qualified design-builders, the  
14 government entity shall pay a stipend, the amount of which  
15 shall be established in the request for proposals, to each  
16 design-builder who submitted a proposal but was not accepted.  
17 Such stipend shall be no less than one-half of one percent  
18 of the total project budget. Upon payment of the stipend to  
19 such a design-builder, the government entity shall acquire  
20 a nonexclusive right to use the design submitted by the  
21 design-builder, and the design-builder shall have no further  
22 liability for the use of the design by the government entity in  
23 any manner. If the design-builder desires to retain all rights  
24 and interests in the design proposed, the design-builder shall  
25 forfeit the stipend.

26 b. When solicitations require a two-phase,  
27 qualifications-based selection process, the process shall be  
28 conducted as follows:

29 (1) Phase one. Request for statements of qualifications of  
30 design-builders.

31 (a) The government entity must prepare a request for  
32 statements of qualifications. The request shall include  
33 general information on the project site, project scope,  
34 schedule, selection criteria, the time and place for receipt  
35 of statements of qualifications, and other information

1 that may assist the government entity in its selection of a  
2 design-builder.

3 (b) The government entity shall state the selection  
4 criteria in the request for statements of qualifications. The  
5 selection criteria may include the design-builder's experience,  
6 past performance, safety record, proposed personnel and  
7 methodology, and other appropriate factors that demonstrate the  
8 capability of the design-builder.

9 (c) Selection criteria will be ranked and assigned points  
10 for each category. Point assignments shall be included as a  
11 part of the request for statements of qualifications.

12 (d) The government entity shall not request fees or prices  
13 in phase one. Any submissions with disclosed fees or prices  
14 will be disqualified and removed from consideration.

15 (2) Phase two. Negotiations.

16 (a) Negotiations shall be conducted, beginning with the  
17 design-builder ranked first. If a contract satisfactory  
18 and advantageous to the government entity can be negotiated  
19 at a price considered fair and reasonable and pursuant to  
20 contractual terms and conditions acceptable to the government  
21 entity, the award shall be made to that design-builder.

22 (b) In the event that a contract cannot be negotiated  
23 with the design-builder ranked first, negotiations with that  
24 design-builder shall be formally terminated. The government  
25 entity shall conduct negotiations with the next-highest-ranked  
26 design-builder and continue this process until a contract can  
27 be negotiated that meets the terms of subparagraph division (a)  
28 of this subparagraph.

29 Sec. 3. Section 262.34, subsection 1, Code 2020, is amended  
30 to read as follows:

31 1. a. When the estimated cost of construction, repairs,  
32 or improvement of buildings or grounds under charge of the  
33 state board of regents, including construction, renovation, or  
34 repairs by a private party of a property to be lease-purchased  
35 by the board, exceeds one hundred thousand dollars, the board

1 shall advertise for bids for the contemplated improvement or  
2 construction and shall let the work to the lowest responsible  
3 bidder. However, if in the judgment of the board bids received  
4 are not acceptable, the board may reject all bids and proceed  
5 with the construction, repair, or improvement by a method as  
6 the board may determine. All plans and specifications for  
7 repairs or construction, together with bids on the plans or  
8 specifications, shall be filed by the board and be open for  
9 public inspection. All bids submitted under [this section](#) shall  
10 be accompanied by a deposit of money, a certified check, or a  
11 credit union certified share draft in an amount as the board  
12 may prescribe.

13 b. The state board of regents may proceed with a  
14 construction, repair, or improvement by using an alternative  
15 project delivery contract in accordance with the provisions of  
16 section 26.17.>

17 2. Title page, by striking lines 1 through 4 and inserting  
18 <An Act relating to public construction bidding.>>

19 3. By renumbering as necessary.

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TODD TAYLOR